

Civil Division – New Castle

March 23, 2006

The Honorable Frank B. Calio, State Election Commissioner
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Re: Cape Henlopen Referendum

Dear Commissioner Calio and Mr. McDowell:

We have been asked two questions regarding the March 16, 2006 referendum conducted by the Cape Henlopen School District (“Cape”). The first question is whether Cape violated any criminal statutes when it offered a free pizza party for the school with the documented highest percentage of students whose parents voted. The second question is whether an alleged \$5000 donation to Cape that paid for Cape’s support of the referendum violated Delaware’s Campaign Finance Act. For the reasons set forth below, we answer both questions in the negative.

The facts that have been reported to us are as follows. On or about March 14, 2006, George G. Stone, Superintendent of the Cape Henlopen School District, sent a letter accompanied by a flyer to the parents or guardians of students in the District. The letter encouraged parents to vote yes in support of the March 16 referendum. The accompanying flyer, entitled "Earn a Pizza Party for Your Child's School," instructed voters to drop a portion of the flyer into a box at the registration table when they voted, and advertised a free pizza party for the school with the highest percentage of students represented. Finally, Superintendent Stone reportedly stated in a radio interview that Cape had received a \$5000 donation to pay for support of the referendum including the pizza party.

The issue raised by the first question is whether the promise of a free pizza party under the circumstances described above constitutes a crime. Pursuant to Delaware law, there are several criminal offenses relating to the conduct of elections that need to be considered under the facts as presented. First, the Delaware Constitution proscribes the crimes of bribery and influencing voters; however, under their express terms these provisions apply only to general, special, and municipal elections. DEL. CONST. art. V, §§3 and 7. Therefore, they are inapplicable to school referenda.

Additionally, other offenses involving bribery, improper influence and official misconduct are found in Title 11 of the Delaware Code. In each instance, however, an element of the offense includes a finding that the conduct in question has resulted in the bestowal of a personal benefit upon a public servant. 11 *Del. C.* §§1201, 1203, 1205, 1206, 1207, 1211, 1212. There is no suggestion in the facts reported to us that the

passage of the referendum conferred a personal benefit upon any public servant. The pizza party arrangements at issue do not violate these provisions of Title 11.

Finally, Title 15 of the Delaware Code, which contains Delaware's election laws, enumerates criminal offenses that stem from election activity,¹ including referenda. 15 *Del. C.* §5105. The majority of these statutes criminalize specified conduct by or toward election officers. "Election officers" are the inspectors, judges and clerks appointed for each election district. 15 *Del. C.* §101(7). No one has reported to us any allegations regarding the conduct of or toward election officers. A careful review of each remaining Title 15 criminal offense establishes that none prohibits the conduct alleged to have occurred during the Cape referendum. It is possible that a voter may have a civil cause of action pursuant to 15 *Del. C.* §5162 if the voter can allege that a person attempted to control the exercise of his or her right to vote. Because this statute creates a civil claim rather than a criminal offense, the Attorney General has no jurisdiction to enforce its provisions.

Resolution of the second issue is straightforward. Delaware's Campaign Finance Act regulates contributions to and expenditures by candidates in any primary, general or special election. 15 *Del. C.* Ch. 80. By its terms, the Act does not apply to school referenda. We note that, while Delaware's Campaign Finance Act does not apply, the Delaware Freedom of Information Act (FOIA) does. Any records that reflect the receipt of the reported donation as well as any records that reflect expenditure of the proceeds of

¹ Title 14 of the Delaware Code, which contains Delaware's education statutes, imposes criminal penalties for voting in school elections by persons who are not qualified electors. 14 *Del. C.* §1085. We understand from state elections officials that no instance of such voting has been uncovered in the Cape referendum.

The Honorable Frank B. Calio, State Election Commissioner
Kenneth McDowell, Administrative Director
March 23, 2006
Page 4

the reported donation are public records subject to disclosure under the FOIA. We have received at least one inquiry from the public concerning the Attorney General's authority to investigate alleged violations of the Freedom of Information Act under 29 *Del. C.* §10005(e). If such a complaint is received, it will be the subject of a separate opinion.

In conclusion, we find that there was no criminal conduct arising from the pizza party arrangement reported to us. However, one final issue bears mentioning, namely, the appearance Cape created when it used the pizza party arrangement to build support for the referendum. Although not criminal in nature, the circumstances of the arrangement gave an appearance of impropriety. We understand that a school district seeking to pass a referendum to raise funds would naturally support the referendum and seek its passage. We also understand that a school district may be expected to engage in get out the vote activity to enhance the referendum's prospects of passage. However, where a school district simultaneously entreats parents of its students to vote yes in the referendum and informs the parents that those students have the opportunity for a reward if sufficient parents vote, the district creates an appearance of impropriety. Such conduct undermines the public's confidence in the election results, as well as school officials and should be avoided.

Please let us know if you have any questions.

Very truly yours,

A. Ann Woolfolk
Deputy Attorney General

The Honorable Frank B. Calio, State Election Commissioner
Kenneth McDowell, Administrative Director
March 23, 2006
Page 5

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